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Supreme Court, U.S.
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In The

Supreme Court of the United States

STATE OF WISCONSIN EX REL.,
SCOTT A. HEIMERMANN,
Petitioner,

v.

JOANNE SWYERS,
Respondent.

On Petition for Writ of Certiorari to the Court of Appeals of Wisconsin District IV

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Scott Alan Heimermann, though morally and technically innocent, was convicted 18 years ago for the August 19, 1989 murders of Milwaukee, Wisconsin, gangsters Mohammad Binwalee and Dion Russell, who were shot by Joseph Isajiw and Edward J. Piscitello a longtime informant to the Milwaukee law enforcement community. Heimermann remains in prison because no court, state or federal, has ever allowed him access to postconviction discovery or an evidentiary hearing to prove his substantive claims. Instead, those courts continue to rely on Wisconsin and federal habeas corpus procedural rules in denying Heimermann his liberty. Additionally, two state governorships have repeatedly turned down Heimermann's bids for a pardon. These courts and Wisconsin executive body continue to do this even though the state's key complaining witness who helped put Heimermann in prison wrongfully had recanted his testimony; and several new corroborating pieces of postconviction document-based evidence now undermine the state's key witness's trial testimony which also implicate Milwaukee law enforcement officials as creating the circumstances that led to the murders of Binwalee and Russell, not Heimermann. Now, over a decade later, as local law enforcement and Wisconsin prison officials deliberately blocked Heimermann's only remaining viable opportunity of court access to prove his innocence, Heimermann has filed an action under 42 U.S.C. § 1983, seeking to restore postconviction and habeas access to the courts for purposes of invalidating his convictions. The questions presented are:

1. May Heimermann use § 1983 as a devise for restoring postconviction and habeas access to the

courts when he had a pending meritorious substantive claim for which was blocked because of Respondents' deliberate wrongdoing and for which Heimermann now has no other viable forum to decide his non-frivolous claims?

2. If he can use § 1983, should Heimermann be entitled to a prospective injunction and/or compensatory and actual damages against the Respondents and their representatives to remedy the underlying injury resulting from the ongoing violation of his right to meaningful postconviction and habeas access to the courts and to prevent future violations?

PARTIES TO THE PROCEEDINGS

Petitioner Scott A. Heimermann, *Plaintiff-Appellant below, Petitioner*

Gary R. McCaughtry, Mark W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan, Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma, Lynda J. Schwandt, John Doe and John Doe 2, *Defendants below*

Respondent Joanne Swyers, *Defendant-Respondent below, Respondent*

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OPINIONS BELOW

The order denying discretionary review of the Supreme Court of Wisconsin in this case was filed on April 14, 2009, and is attached at App. 32a. The opinion of the Wisconsin Court of Appeals in this case (App. 1a) is unpublished and available at 2008 Wisc. App. LEXIS 1005.

JURISDICTION

The Supreme Court of Wisconsin issued its discretionary order on April 14, 2009. On July 9, 2009, Justice Stevens extended the time within which to file this petition for writ of certiorari to and including September 11, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "[N]or shall any state deprive any person of life, liberty, or property, without due process of law."

42 United States Code § 1983 provides in part:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, immunities secured by the Constitution and laws, shall be liable to the

party injured in an action at law, suit in equity, or other proceeding for redress[.]"

STATEMENT OF THE CASE

1. *The homicides of Mohammad Binwalee and Dion Russell.* At the age of 12, at 13, and growing up on his parent's dairy farm in the rural town of Chilton in northeastern Wisconsin Scott Alan Heimermann began his efforts to become a successful entrepreneur. He went to technical school and studied real estate and finance, for which Heimermann received a Wisconsin real estate brokers license in August 1984. In mid-1986, he moved to Milwaukee, Wisconsin, and founded H.A.S. Investments Inc., which brought and renovated real estate of rundown neighborhoods in Milwaukee. In his first year of business, Heimermann's real estate company generated about $800,000 in annual revenue from real estate investments. A certain Milwaukee native named Edward J. Piscitello in early-April 1989 approached Heimermann.[1] They began swapping phone calls between in-person meetings, as eventually the two settled into a comfortable day-to-day routine looking at real estate on the south side and east side of Milwaukee. Piscitello bragged to Heimermann that he was privy to secret information relating to federal agencies seized real estate, which eventually were announced and appeared in the newspapers.[2] That is

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[1] Piscitello made contact with Heimermann at a Marquette University campus bar in Milwaukee.

[2] However, what Piscitello did not tell Heimermann was that he was a longtime informant for federal, state and local law enforcement agencies. As discussed *infra*, Heimermann received

how Heimermann ended up buying a single-family house in Milwaukee at 941 South 35th Street in late-June 1989. The arrangements for that house were made by Piscitello. And this is how both of them ended up living together at that property. (Trial Transcript, Dec. 11, 1991 at 6-14,51.) The relationship between Piscitello and Heimermann reached a sad denouement on August 19, 1989. That is when both Joseph Isajiw and Piscitello, the main architect, conspired to shoot and kill Mohammad Binwalee and Dion Russell at the residence at 941 South 35th Street. (App. 2a-3a.)

2. *The Milwaukee police investigation.* Some nineteen months after the two homicides, on March 7, 1991, Piscitello walked into the Milwaukee Police Department's downtown headquarters, where Piscitello made contact with a certain Milwaukee vice-squad detective named Barry Debraska Jr., who eventually introduced Piscitello to a certain Milwaukee homicide detective named Brian O'Keefe. Based on Piscitello's information, county Deputy District Attorney Robert Donohoo, the highest-ranking official handling the case, convened a March 8, 1991 search warrant proceeding with Piscitello, Debraska and O'Keefe. A transcript of the search warrant application held on March 8, 1991 remained sealed by court order at the request of Donohoo and that transcript was not provided to Heimermann until almost seven years after his convictions, March of 1998. Now, the transcript makes clear that both Debraska and

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new affidavits from Piscitello confirming this fact. In those affidavits, Piscitello also said that Heimermann was not a target of any criminal investigation for the purpose of Piscitello making contact with Heimermann in April 1989.

O'Keefe vouched for the reliability of Piscitello who had given Milwaukee law enforcement accurate information on drug deals on prior occasions. Piscitello told the county court commissioner that he was present in the residence at 941 South 35th Street in August 1989 when Binwalee and Russell were shot and then buried in the basement. Piscitello generally described Heimermann as being present when the two gangsters were shot but he didn't detail the alleged role of Heimermann in the two homicides. Piscitello also implicated Heimermann in pawning jewelry taken from the two gangsters. (Search Warrant Transcript, Mar. 8, 1991 at 3-10.)[3] Then, Piscitello was placed under the Federal Witness Protection Program and had been relocated to Phoenix, Arizona as a federally protected witness. Later, Piscitello relocated to San Diego, California, for reasons of his own, but let Debraska and O'Keefe know how to reach him. (1664: App. to pet. for writ of habeas corpus 44,73.)[4] Together, Debraska and his ally O'Keefe became an influential force in shaping the outcome of the homicide investigation. County prosecutor Jon Reddin, who

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[3] That Heimermann pawned jewelry in August 1989 was accurate, with a qualification: On cross-examination of several police officers at trial it was established that Heimermann *unwittingly* pawned the jewelry "for Piscitello" who "originally had taken it" from the two dead bodies. (Trial Transcript, Dec. 11, 1991 at 54,75.) In light of some two decades of postconviction litigation, it now is clear that Piscitello orchestrated the pawning of victims' jewelry to have Heimermann framed for Binwalee and Russell's murders.

[4] On June 1, 2005, Heimermann filed a petition for original writ of habeas corpus with this Court. *See* ***In Re Heimermann,*** Case No. 04-1664. Heimermann will use the prefix "1664," when referring to the file in case 04-1664.

eventually prosecuted Heimermann, also became actively involved with Debraska and O'Keefe in determining the investigation. Heimermann was arrested on April 18, 1991 at his home in Fort Lauderdale, Florida, and thereafter volunteered to return to Wisconsin.[5]

3. *Heimermann's trial and convictions.* Joseph Isajiw was the state's key witness at Heimermann's trial.[6] Isajiw testified that Heimermann allegedly agreed to lure Binwalee and Russell to his residence at 941 South 35th Street so that Isajiw and Piscitello could kill them. ***State v. Heimermann,*** 1995 Wisc. App. LEXIS 967 at *4 (Wis. App. Aug. 8, 1995) (unpublished). Nevertheless, Isajiw was an extremely flawed witness. According to a postconviction police report uncovered by Heimermann, which his trial attorney overlooked, it describes an interview and a statement by O'Keefe that he was interested in recovering the guns used in the two homicides. At first, Isajiw replied that the guns were "still in possession of a family member" and that "he was reluctant to identify this family member." Then he said he would help in the recovery of the murder weapons, but only "if arrangements could be made to leave his relatives out of this matter." (1664: App. to pet. for writ of

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[5] As in the search warrant application of March 8, 1991, a copy of the arrest warrant transcript also was kept under wraps by the state until seven years after Heimermann's convictions.

[6] Isajiw cut a deal in August 1991, pleading guilty as charged and agreed to cooperate with Milwaukee prosecutors in the separate trials of both Piscitello and Heimermann. After their trials, Isajiw was given two concurrent life sentences with a parole eligibility date of 13½ years.

habeas corpus 104.) What this means, of course, is not only that a prophylactic deal was struck between the state and Isajiw "to leave his relatives out of this matter" in exchange for Isajiw's testimony against Heimermann -- as O'Keefe never again pursued the issue of recovering the murder weapons from that early point on -- but also that the wrong person (Heimermann) was arrested and convicted and that the real criminals (Isajiw's "family member" or "relatives") have never been brought to justice. Therefore, Isajiw's 1991 trial testimony could explain why, despite his innocence, Heimermann was charged with the murders of Binwalee and Russell: it made sense why Isajiw put Heimermann in the mix, because then Isajiw could keep the spotlight far away from his "family members" or "relatives" (now confirmed to be Isajiw's brother Nick Isajiw and friends of theirs whom had resided in northern Wisconsin and who in fact harbored Isajiw as a fugitive from justice when law enforcement was looking for him after the bodies of Binwalee and Russell were brought to the forefront in March 1991) -- a point corroborated both by the state's key complaining witness Piscitello and his trial attorney Jill Tan, which she is very clear in her trial notes on two critical points: "Joe called Nick about burying the bodies ... could get weapons through Nick." (1664: App. to pet. for writ of habeas corpus 76.) In fact, Piscitello insists in his postconviction affidavit that he remembers seeing Joe Isajiw calling his brother Nick at the scene later that night of the murders, and Joe asking Nick about "wrapping the bodies." *(Id.* at 46.)

Joanne Danbrova also testified for the state at Heimermann's trial. Danbrova testified that she heard Heimermann state that "in order to get T.C.

[Binwalee] they would have to go through his body guard [Russell]" and "[k]ill him." 1995 Wisc. App. LEXIS 967 at *20. But another postconviction police report uncovered by Heimermann, which his trial attorney also overlooked, shows that that statement attributed to Heimermann by Danbrova didn't happen -- at least it was not said by Heimermann. According to this police report, Christine Schroeder confirms that the conversation Danbrova supposedly heard about killing the two gangsters did not include Heimermann, a statement that Heimermann also vehemently denied making at trial. *See* ***State v. Heimermann***, Appeal No. 97-3208 – voluntarily dismissed February 23, 1998. In short, the Milwaukee police coerced the testimony of Isajiw and Danbrova to frame Heimermann for Binwalee and Russell's murders.

Lastly, toward the end of the 1991 trial, the defense presented a witness named Christine Vanderkieft. Vanderkieft -- who like Danbrova, was a female friend of Heimermann. Vanderkieft testified to being in Fort Lauderdale, Florida, with Heimermann in September 1989, which became the new domicile of Heimermann after the two homicides. Vanderkieft recalled Heimermann telling her about the two murders, for which he said, "if anything would go down he would be framed for it." (Trial Transcript, Dec. 12, 1991 at 8.) Later, while heatedly protesting his innocence, Heimermann was convicted and sentenced to two consecutive life terms with a parole eligibility date of December 2017 (App. 3a.)

4. *Heimermann's first federal application for habeas corpus relief.* On October 30, 1995, Heimermann filed with the United States District Court for the Eastern District of Wisconsin his first petition for writ of

habeas corpus pursuant to 28 U.S.C. § 2254 challenging his state court convictions and life sentences. Heimermann based his federal habeas application to vacate his state judgment of convictions on four interrelated claims: (a) ineffective assistance of counsel; (b) actual innocence; (c) newly discovered evidence; and (d) prosecutorial misconduct. The basic premise of these claims made reference to Piscitello being the state's key complaining witness and a confidential informant of several Milwaukee police detectives, of the same precinct as the August 19, 1989 shootings, and that Piscitello and his cohorts in Milwaukee law enforcement were the driving force behind the two homicides and having Heimermann framed. On January 5, 1996, the district court summarily dismissed Heimermann's federal habeas petition, finding Heimermann's contentions "conclusory, fanciful, and even true, would do little or nothing to undermine confidence in the outcome of Heimermann's trial." ***Heimermann v. Abrahamson***, No. 95-C-1101 at 11 (E.D. Wis. Jan. 5, 1996). Heimermann sought reconsideration, arguing for the district court to order release of withheld documents by Milwaukee prosecutors and law enforcement pursuant to Rule 6(a) Rules Governing Section 2254 Cases. Additionally, Heimermann asked the district court to order Wisconsin Department of Corrections ("WDOC") to retain Piscitello in Wisconsin and not transfer Piscitello to an undisclosed out of state facility until Piscitello was presented in federal court to testify on his relationship with Milwaukee law enforcement.[7]

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[7] While working at his prison job on April 2, 1996, Heimermann happened upon an inmate transfer document relating to prisoners being transferred out of state. That transfer document showed

Heimermann claimed that the results of this evidence would establish the prejudice necessary for his ineffective assistance and prosecutorial misconduct claims and would prove his actual innocence. The district court denied Heimermann's request for reconsideration. On appeal, the Seventh Circuit dismissed the appeal for lack of jurisdiction as to the district court's January 5, 1996 judgment, and it affirmed as to the district court's order denying Heimermann's requests for discovery and reconsideration. *See* ***Heimermann v. Abrahamson,*** Appeal No. 96-3567 (7th Cir. Feb. 21, 1997) (unpublished order). On June 2, 1997, this Court denied Heimermann's petition for writ of certiorari. *See* ***Heimermann v. Vander Ark***, 520 U.S. 1258 (1997).

5. *Heimermann's federal applications seeking authorization to file a second or successive petition for writ of habeas corpus.* Heimermann's eight application for authorization to file a second or successive petition for writ of habeas corpus pursuant to 28 U.S.C. § 2244(b)(3) in November 2002 was denied. With his application, Heimermann presented several new sworn affidavits from the state's key complaining witness Piscitello. On November 16, 1998, Piscitello made initial contact of his own accord with Heimermann, but he was using intermediary Truth Bible Church in Waukesha, Wisconsin, for this and all subsequent correspondence with Heimermann to protect his witness protection location. (1664: App. to pet. for writ

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that one of the prisoner's names on it was Piscitello who was being transferred to an undisclosed out of state facility because he was deemed to be in the witness protection program.

of habeas corpus 40-41.) "Remember I put you in prison with what was called the perfect crime. Therefore, I can get you out as well,!!!" said Piscitello in his correspondence to Heimermann.

Heimermann however, did not receive Piscitello's first sworn affidavit dated December 28, 1999, until early-January 2000. (1664: App. to pet. for writ of habeas corpus 42-50.) Piscitello confirmed that he was in fact the state's key complaining witness who helped put Heimermann in prison wrongfully; he validated his working relationship with state and federal law enforcement agencies around the time he initiated contact with Heimermann in April 1989 and the time Binwalee and Russell were killed and for a period thereafter; and he implicated Milwaukee vice-squad detective Barry Debraska Jr. as having knowledge of the 1989 homicides all along, as Piscitello said he had worked with Debraska and other Milwaukee law enforcement agents in drug investigations against Binwalee and his gang during the days leading to the two homicides. (1664: App. to pet. for writ of habeas corpus 42-50.) In his new sworn affidavits, Piscitello also recanted his 1991 testimony about Heimermann: ". . . at no time was Mr. Heimermann actually aware of the murder plan nor could he have been actually aware of the same . . . nor did Mr. Heimermann participate in the commission of these murders," said Piscitello. (1664: App. to pet. for writ of habeas corpus 45.)

Other affidavits of Piscitello also were dated in December of 2000 and September 10, 2002 for which Heimermann received shortly thereafter. (1664: App. to pet. for writ of habeas corpus 51-72.) They were also submitted to the Seventh Circuit.

On June 20, 2000, as Heimermann awaited for more information from Piscitello, Agent Buford Gates for U.S. Customs Enforcement wrote to Heimermann with a detailed statement and supporting exhibits. (1664: App. to pet. for writ of habeas corpus 83-94.) Agent Gates detailed for Heimermann how Milwaukee vice-squad detective Debraska and homicide detective O'Keefe were close friends; that they had a solid working relationship; and that in 1995, both Debraska and O'Keefe falsely implicated Gates as the Milwaukee law enforcement officer that had been the driving force behind the murders of Binwalee and Russell.[8] Of course, after a thorough U.S. Customs internal investigation, Agent Gates was completely exonerated solely because of evidence that Debraska and O'Keefe's allegations were "bullshit." "If false accusations can be made against a respected federal agent, then it can certainly happen to others," said Agent Gates. (*Id.* at App. 83.) Agent Gate's information was submitted to the Seventh Circuit, too.

On November 26, 2002, without briefing or argument, the Seventh Circuit denied Heimermann's application. "Heimermann's contentions do not even remotely suggest his innocence; rather, they obliquely

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[8] This statement of Agent Gates brought into focus the purpose of Debraska (a vice-squad detective) had with his "friend" O'Keefe (the lead homicide detective) at the beginning stages of the search warrant proceeding held on March 8, 1991 and for a period thereafter: To shape the murder investigation favorably so Debraska's complicity would not be found in the two homicides and so he could benefit from prestige resulting from arrest and convictions of *other* targeted individuals of the 1989 drug investigations against Binwalee and his gang. (1664: App. to pet. for writ of habeas corpus 73-75,78-81.)

imply police misconduct regarding promises made to a confidential informant, who happens also to be one of Heimermann's codefendants. Even the CI's affidavit does not explicitly repudiate his testimony that he saw Heimermann standing over his victims holding a gun almost immediately after they were shot," said the Seventh Circuit in its decision.[9] ***Heimermann v. McCaughtry,*** Appeal No. 02-4033 (7th Cir. Nov. 26, 2002). Heimermann continued to push his case of innocence with the Seventh Circuit by filing a document entitled "motion directed to the en banc court to stay enforcement of the panel's order entered on November 26, 2002, and motion directed to en banc court for leave to file a motion requesting referral of case to a special master for factual hearing" in order to assess the reliability of the state's complaining witness Piscitello and Agent Gates. Thereafter, in a February 4, 2002 order the Seventh Circuit fined Heimermann $5,000.00 for filing this document, which the Seventh Circuit *erroneously* construed as "a petition for rehearing" under 28 U.S.C. § 2244(b)(3)(E). ***Heimermann v. McCaughtry,*** Appeal No. 02-4033 (7th Cir. Feb. 4, 2003).

6. *Heimermann's 2005 petition for an original writ of habeas corpus.* On June 1, 2005, Heimermann filed an application with this Court for an original writ of habeas corpus, with supporting appendix, pursuant to this Court's original jurisdiction. *See* Supreme Court Rule 20.4(a); 28 U.S.C. § 2241(b). Heimermann requested this Court to take the extraordinary step of

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[9] No fair-minded court can review the new information of Piscitello and Agent Gates and conclude what the Seventh Circuit said here.

instructing the United States District Court for the eastern district of Wisconsin to hold an evidentiary hearing, order discovery and make findings of fact as to whether exculpatory evidence that the state omitted in its case against Heimermann clearly establishes Heimermann's innocence. On October 3, 2005, however, this Court refused to take that extraordinary step and denied Heimermann's petition for an original writ of habeas corpus. *See* ***In re Heimermann,*** 546 U.S. 808 (2005).

7. *Heimermann's 2007 state application for postconviction relief.* Heimermann's third motion for postconviction relief pursuant to Wis. Stat. § 974.06, with supporting exhibits, in May 2007 was denied by the Milwaukee County Circuit Court. The court deemed that newly discovered document-based evidence of Binwalee's release from Milwaukee police custody on March 21, 1989 didn't sufficiently constitute a sufficiently viable postconviction discovery claim so Heimermann could prove his innocence. ***State v. Heimermann,*** 2008 Wisc. App. LEXIS 517 at *3 (Wis. App. July 1, 2008)(unpublished). Heimermann wanted the circuit court to compel the release of records presumably still being withheld by the county's prosecutors and Milwaukee law enforcement, such as: (a) any and all documentation possessed or under control of Milwaukee law enforcement (state, federal and local agencies) concerning the development and handling of Piscitello during the period of March 21, 1989 through August 19, 1989, along with the names of the law enforcement agents who had contact with Piscitello during such times and a copy of those law enforcement agents' personnel files relevant to those dates; (b) any and all Milwaukee law enforcement reports, including but not limited to original reports,

continuation reports, supplemental reports, property reports, evidence impound reports, confidential informant voucher reports, and witness statements prepared by any Milwaukee law enforcement agent concerning Piscitello and Binwalee and his gang during the period of March 21, 1989 through August 19, 1989; (c) any and all copies of any surveillance videotape from Milwaukee law enforcement concerning any drug investigations against Binwalee and his gang during the period of March 21, 1989 through August 19, 1989; (d) any and all Milwaukee law enforcement reports that will advise of what, exactly, the determination was as to why Milwaukee law enforcement decided not to oppose Binwalee's release from the Milwaukee County Jail on March 21, 1989; and (e) any and all reports prepared by Milwaukee law enforcement about Heimermann trying to be a law-abiding citizen and telephonically contacting the Milwaukee police in July 1989 and telling police that he was concerned that Piscitello was going to continue to attempt to hurt Binwalee and others and documents on Milwaukee police subsequently making contact with Heimermann at the residence at 941 South 35th Street where Piscitello and Heimermann were living together at the time (described as "as-yet-undisclosed state evidence" in this petition). 2008 Wisc. App. LEXIS 517 at *5.

Heimermann's postconviction discovery request was made under a state case known as ***State v. O'Brien***, 223 Wis. 2d 303, 588 N.W.2d 8 (1999), which allows a convicted defendant "a right to postconviction discovery when the sought-after evidence is relevant to an issue of consequence." *Id.* at 321; *see also* ***District Attorney's Office for the Third Jud. Dist. v. Osbourne***, 557 U.S. ___, 129 S. Ct. 2308, 2317, 2009

U.S. LEXIS 4536 (2009)(noting that, under an applicable statutory provision, a convicted defendant could raise a claim based on newly discovered evidence only if it was "pursued with due diligence."). Heimermann contended that since Piscitello was the primary complaining witness, who had gotten the criminal case going for Milwaukee law enforcement on March 7, 1991, he had a right look at this as-yet-undisclosed document-based evidence to lay out a minute-by-minute description of what Milwaukee law enforcement knew he was doing in the timeline between when Piscitello made contact with him in April 1989 and in the days leading to the deaths of Binwalee and Russell and afterwards, which information in turn would cast serious doubt on the key witness's (Isajiw's) credibility in his account of Heimermann's alleged role in the two homicides. Without ever ordering postconviction discovery or an evidentiary hearing to assess the reliability of his new evidence claim so that Heimermann could prove his innocence, the circuit court denied Heimermann's claims of newly discovered evidence because they were "implausible and based on nothing more than speculation." 2008 Wisc. App. LEXIS 517 at *3. The Wisconsin Court of Appeals affirmed the circuit court's denial of Heimermann's newly discovered evidence and postconviction discovery claims, ruling, "the evidence he has presented is insufficient to support such a claim." 2008 Wisc. App. LEXIS 517 at *6, n.4. However, the issue was not whether just this new piece of documentary evidence regarding Binwalee's release would have changed the outcome of Heimermann's 1991 trial. Rather, this document-based evidence regarding the state's release of Binwalee is *one more piece of evidence* that the state's case against Heimermann cannot be trusted. This is an affront to

any reasonable notion of due process, as deliberately withholding exculpatory evidence is, and should be, grounds for retrial, Heimermann argued to the Wisconsin appellate court. In any event, it then fell to the Supreme Court of Wisconsin, to which Heimermann had appealed, to offer Heimermann justice. That court had jurisdiction to give the state's discredited party to a crime to a double homicide theories the thrashing they deserve, and it could have, at a minimum, stood up for the Constitutional rights of Heimermann when Milwaukee police and prosecutors are trampling them. Nevertheless, the Supreme Court of Wisconsin denied Heimermann's request for discretionary review. 2008 Wisc. LEXIS 914.

8. *Heimermann's bids for a governor's pardon.* Since 2000, Heimermann had written to two governorships in Wisconsin and went through application processing seeking a pardon, only to be repeatedly denied, without the governorships ever studying and considering proffered witness testimony and other documentary-based evidence that supported Heimermann's innocence. (1664: App. to pet. for writ of habeas corpus 35-36.)

9. *Heimermann's federal civil rights action.* Heimermann had alleged in a *sworn*[10] federal civil rights complaint under 42 U.S.C. § 1983 filed on January 16, 2004 in the Dane County Circuit Court in Madison, Wisconsin, that the conduct of Respondents, undertaken while acting in their official and/or

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[10] *See e.g.*, 18 U.S.C. § 3600(a)(1).

individual capacities,[11] blocked his only remaining viable opportunity of court access to seek justice in the Outagamie County Circuit Court on February 12, 1999. (App. 7a-8a.)

On February 12, 1999, an Outagamie County judge held a habeas corpus hearing at which Respondent Swyers testified. She testified that Dodge County law enforcement and WDOC officials had a law enforcement working relationship with Heimermann in mid-1998. (Habeas Hearing Transcript, Feb. 12, 1999 at 12.) Swyers confirmed that Heimermann had provided her department and WDOC officials' undercover services in a months-long criminal investigation against former prison guards, Robert Fecke and David Muchka, in mid-1998. *(Id.; see also* 1664: App. to pet. for writ of habeas corpus 106-107.) In exchange for his services, Swyers testified that she agreed to help Heimermann in locating Piscitello who Heimermann claimed could establish that his 1991 convictions are void. (Habeas Hearing Transcript, Feb. 12, 1999 at 13-14,25-26; *see also* 1664: App. to pet. for writ of habeas corpus 108-109.)

But all that went out the window when the Respondents intentionally misled the Outagamie County judge about the true nature of the criminal investigations again Fecke; "employed improperly motivated pretexts to postpone and horse [Heimermann] around . . . regarding the Edward J.

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[11] *See* Heimermann's sworn Civil Complaint at ¶36.

Piscitello promises;"[12] and up until Piscitello died[13] denied Heimermann access to the testimony of informer Piscitello.

Therefore, it was impossible for Heimermann to get the Outagamie County judge to cut through the Gordian knot then stalling access to Piscitello. With this void, Heimermann filed a motion in Dane County Circuit Court to compel the release of the as-yet-undisclosed evidence held by Milwaukee law enforcement and prosecutors on February 5, 2007. (*See* Heimermann's Motion and Memorandum to Compel the Defendants and Their Attorneys to Produce Physical Documents That Will Establish Plaintiff's Innocence.) That filing was intended to gather the aforementioned as-yet-undisclosed state evidence and do what Heimermann said at the 1999 state habeas corpus proceeding – namely, to establish the invalid basis for his 1991 convictions based on the state's "fraud and outrageous government conduct" at the time of trial. (Heimermann's sworn civil complaint at ¶¶37-38,96-105; Habeas Hearing Transcript, Feb. 12, 1999 at 25-26.)

That state fraud and outrageous government conduct rely upon simple *uncontested* facts: Milwaukee law enforcement released Binwalee in March 1989 for the war on drugs, which then had fostered Milwaukee law enforcement's use of Piscitello to build a drug case against Binwalee and his gang, which drove Piscitello

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[12] *See* Heimermann's sworn civil complaint at ¶109.

[13] Piscitello died on September 1, 2006 in custody before Heimermann could depose him.

to luring Heimermann in April 1989 in a proposed real estate deal to become a useful, though unwitting ally, to Piscitello's scheme to murder Binwalee and Russell in August 1989. This means that Milwaukee law enforcement facilitated the circumstances that led to the deaths of Binwalee and Russell, not Heimermann. *See* ***State v. Steadman,*** 152 Wis. 2d 293, 302, 448 N.W. 2d 267 (Ct. App. 1989); ***United States v. Russell,*** 411 U.S. 423, 431-32 (1973). In other words, Milwaukee law enforcement navigating both Binwalee (via his release) and Heimermann (via Piscitello's initial contact) into the arms of an informant with known violent tendencies, such as Piscitello, created "a sufficiently close nexus between the state and the challenged action of [Piscitello] so that the action of the latter may be fairly treated as that of the state itself," ***Jackson v. Metro. Edison Co.,*** 419 U.S. 345, 351 (1974). Accordingly, the 1991 convictions which is based on the state's theory that Heimermann played an important role in facilitating the deaths of drug dealers Binwalee and Russell, was a fraud by the state and sheer fantasy.

In addition, Heimermann's void prosecution argument is in accord with well-established law. In ***State v. Campbell,*** 2006 WI 99, ¶¶51-55, 294 Wis. 2d 100, 718 N.W. 2d 649 (2006), citing this Court's precedent in ***Hazel-Atlas Glass Co. v. Hartford-Empire Co.,*** 322 U.S. 238, 244 (1944), the Supreme Court of Wisconsin held that criminal defendants can disregard a judgment or order procured by fraud (holding that such "[a] judgment is a nullity and cannot create a right or obligation. It is not binding on anyone"). 2006 WI 99, ¶42 And Wisconsin provides a habeas corpus right for a criminal defendant to use to collaterally attack a void judgment

when the said judgment supplied the basis for a criminal conviction. *See generally* Wis. Stat. § 782.01; ***State ex rel. Doxtator v. Murphy,*** 248 Wis. 593, 602, 22 N.W. 2d 685, 689 (1946)(providing for discharge from custody upon petition for writ of habeas corpus "where there is peculiar and pressing need for it, or where the process or judgment under which the prisoner is held is wholly void"). Under these circumstances, the holding of ***Campbell*** that a claim based on fraud is void, combined with the holding of ***Doxtator***, means that Heimermann suffered prejudice because the Respondents' intentionally denied him the only remaining viable opportunity for justice in 1999.

Yet the Dane County Circuit Court dismissed Heimermann's sworn complaint, pursuant to ***Heck v. Humphrey***, 512 U.S. 477 (1994), effectively continuing Respondents' deprivation of Heimermann's Constitutional right of postconviction access to the courts. Heimermann appealed, and the Wisconsin Court of Appeals affirmed, concluding that Heimermann cannot seek injunctive relief or recover money damages against the Respondents who wrongfully and intentionally blocked access to his only remaining viable opportunity for justice in 1999. (App. 8a.) The Supreme Court of Wisconsin denied Heimermann's request for discretionary review. (App. 32a.)

REASONS FOR GRANTING THE PETITION

"Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." ***United States v. Garsson***, 291 F. 646, 649 (S.D.N.Y. 1923)(Learned Hand, J.) And although the advances of forensic DNA technology has increased the

number of innocent prisoners going free lately, it would be anomalous to say that innocent people whose cases lack DNA evidence should not be freed. *See e.g.*, Samuel R. Gross, *"Exonerations in the United States: 1989 through 2003,"* 95 Journal of Criminal law & Criminology – (accepted for publication, 2005; earlier version released at http://www.umich.edu/newsandinfo/exonerations-in-us.pdf)(finding 328 wrongly convicted persons have been exonerated, *183 of them were exonerated by non-DNA evidence*). *See also* ***In Re Davis,*** 2009 U.S. LEXIS 5037 (U.S., Aug. 17, 2009)(for the first time in about 50 years prisoner's petition for original writ of habeas corpus transferred to district court for fact finding hearing to adjudicate reliability of various recanted postconviction affidavits of state witnesses). Thus, to shut the courthouse doors to most of these innocent prisoners, which applies to Heimermann's situation, is an outcome clearly not desirable to the interests of public policy and the people in the United States. But in the present case, the Wisconsin appellate court regime has attempted to create a mechanism by which a criminal defendant cannot present a non-frivolous substantive claim after government officials deliberately blocked the defendant's only remaining viable opportunity for justice after the defendant was convicted following an invalid prosecution. (App. 8a.) Therefore, the Wisconsin appellate courts' decisions give rise to the following issue that merits this Court's review:

1. The Wisconsin appellate court regime disallowed a convicted defendant to bring a claim under 42 U.S.C. § 1983 for the purpose of restoring postconviction access to the courts in connection with an already filed substantive void prosecution claim. (App. 8a.) In not allowing Heimermann to do this, the Wisconsin

appellate courts have left Heimermann without any possible route to attack his invalid 1991 convictions, instead of opening the gates to § 1983 relief in order to have his void convictions set aside. Most of the federal courts and this Court have rejected this type of disallowed use of § 1983, concluding that blocking a convicted defendant's right of access to postconviction and habeas corpus courts is not part of a challenge to the validity of a convicted defendant's conviction when a § 1983 action is the only possible route to attack a conviction.

I. CERTIORARI IS WARRANTED TO REVIEW THE WISCONSIN APPELLATE COURTS' HOLDING THAT A CONVICTED DEFENDANT CANNOT SEEK INJUNCTIVE RELIEF AND RECOVER MONEY DAMAGES AGAINST POLICE AND PRISON OFFICIALS WHO HAD INTENTIONALLY BLOCKED HIS ONLY REMAINING VIABLE OPPORTUNITY OF COURT ACCESS TO PROSECUTE A MERITORIOUS STATE HABEAS PETITION IS NOT COGNIZABLE IN 1983 ACTIONS.

A prisoner in state custody may not use a § 1983 action to challenge the fact or duration of imprisonment, but rather must seek habeas corpus relief. ***Wilkinson v. Dotson***, 544 U.S. 74, 78 (2005). The cognizability of a claim under § 1983 depends on the affect of a favorable judgment on the prisoner's claim. An action under § 1983 is barred if success on a claim would "necessarily imply the invalidity of his conviction or sentence." ***Heck v. Humphrey***, 512 U.S. 477, 487 (1994). Justice Souter, in a concurrence joined by Justices Blackman, Stevens, and O'Connor, argued that favorable termination should be required only if

prisoner is eligible for habeas corpus. 512 U.S. at 498-502 (Souter, J., concurring).

Without citing any authority other than ***Heck***, the Wisconsin appellate court concluded in a conclusory fashion that Heimermann could not seek injunctive relief and money damages against police and prison officials who have intentionally and wrongfully blocked his only remaining viable opportunity of court access to prosecute a meritorious state habeas petition. (App. 8a.) That is, the court said if Heimermann were allowed this unchecked access to the courts, the results of that access would invalidate his 1991 convictions, because the state's key complaining witness had recanted his 1991 testimony; and several new corroborating pieces of document-based evidence have now implicated Milwaukee law enforcement officials as facilitating the circumstances that led to the 1989 shootings, not Heimermann.

A. The Wisconsin Appellate Courts and Federal Courts Are Divided On This Issue.

The Wisconsin appellate courts' decisions conflict with most decisions of the federal courts on the ongoing hindered right of postconviction access issue in this case.

In one case, the U.S. District Court for the northern district of Texas allowed a claim substantially identical to Heimermann in ***Lueck v. Watten***, 262 F. Supp. 2d 690 (N.D. Tex. 2003). That court correctly concluded that the claim was cognizable under § 1983 because state officials seized documents that prevented the prisoner from filing a habeas petition. *Id.* The court did not resolve the ***Heck*** question when

the prisoner sought only prospective relief to restore access to the court so the prisoner can litigate a non-frivolous habeas claim. *Id.*

Another U.S. District Court, relying on ***Hoard v. Reddy***, 175 F. 3d 531 (7th Cir.), *cert. denied,* 528 U.S. 970 (1999), reached the same conclusion in ***Barnwell v. West***, 2006 U.S. Dist. LEXIS 9657, 2006 WL 381944, at *3 n.3, *4 (S.D. Ill. 2006). The prisoner in **Barnwell**, like Heimermann, alleged that state officials blocked access to habeas corpus remedies. The court adopted an unobjected-to portion of a magistrate judge's report and recommendation finding that the prisoner's ongoing hindrance access claim is not barred under ***Heck*** where the underlying claim is a habeas petition. *Id.*

A Seventh Circuit panel in ***Nance v. Vieregge***, 147 F. 3d 589 (7th Cir.), *cert. denied* 525 U.S. 973 (1998), ruled that Nance did not show an ongoing hindrance access claim because the prisoner had been released from state custody before he filed his federal rights action. *Id.* at 592. However, the court in ***Nance***, like the U.S. District Courts in ***Lueck*** and ***Barnwell***, recognized that ***Heck*** does not bar prospective relief to restore access to the court so the prisoner can litigate a non-frivolous habeas claim. *Id.* at 591.

Another Seventh Circuit panel reached the same conclusion in ***Hoard***. "There is probably an exception to the rule of ***Heck*** for cases in which no route other than a damages action under Section 1983 is open to the person to challenge his conviction." ***Hoard***, 175 F. 3d at 533.

Additionally, in ***Carr v. O'Leary***, 167 F. 3d 1124 (7th Cir. 1999), the Seventh Circuit held that remand was unnecessary because ***Heck*** probably would not block the 1983 suit where habeas was no longer available, based on Justice David Souter's principle in ***Spencer v. Kemna***, 523 U.S. 1 (1998).

The First Circuit acknowledged the conflict between ***Heck's*** "favorable termination" requirement and Justice Souter's principle in ***Spencer***; moreover, the court decided to leave to the Supreme Court "the prerogative of overruling its own decisions." ***Figueroa v. Rivera***, 147 F. 3d 77, 81 n.3 (1st Cir. 1998).

The Second Circuit in ***Jenkins v. Haubert***, 179 F. 3d 19, 21, 26-27 (2nd Cir. 1999), reached a similar conclusion but in the end held that ***Heck*** did not bar the prisoner's § 1983 suit over a condition (but not the fact or duration) of confinement that could not be challenged through habeas corpus.

And the Sixth Circuit also acknowledged the conflict between ***Heck's*** 'favorable termination' requirement and Justice Souter's principle in ***Spencer*** but remarked that "although ***Spencer*** may cast doubt upon the universality of the 'favorable termination' requirement, we will continue to follow the Supreme Court's directly applicable precedent . . ." ***Huey v. Stine***, 230 F.226, 229-30 (6th Cir. 2000).

B. The Wisconsin Appellate Courts' Decision Contravenes This Court's Precedent.

The Wisconsin appellate courts' rejection of Heimermann's argument that the holding in ***Heck*** is not applicable to his ongoing hindered access claim

also ignores this Court's analysis in ***Spencer v. Kemna***, 523 U.S. 1, 20-21 (1998) which, while not expressly addressing the issue, suggested that ***Heck*** may not apply to prisoners where a § 1983 action is the only possible route to attack an invalid conviction.

Justice Souter's concurring opinion was joined by Justices O'Connor, Ginsberg, and Breyer – who all wrote their concurring opinion in ***Spencer*** saying that a person who is not "in custody," and therefore lacks standing to challenge his conviction by way of habeas corpus, may seek damages in a civil action under 42 U.S.C. § 1983. ***Spencer***, 523 U.S. at 19-21.

Justice Stevens took a dissenting position in ***Spencer*** that the unavailability of a federal habeas remedy should open the gate of § 1983. ***Spencer***, 523 U.S. at 22-25.

Finally, in ***District Attorney's Office for the Third Jud. Dist. v. Osborne***, 557 U.S. ___, 129 S. Ct. 2308, 2009 U.S. LEXIS 4536 (2009) -- reversed in June by this Court -- this Court assumed, without deciding, that a freestanding substantive due process right to access state evidence claim is not barred by ***Heck***. 2009 U.S. LEXIS 4536 at *24.

C. Issues Relating To Respondents' Deliberate Deprivation Of Heimermann's Constitutional Right Of Postconviction and Habeas Access To The Court In An Ongoing And Permanent Manner Should Be Resolved By A § 1983 Action.

This case involves local police and prison officials' deliberate deprivation of a convicted defendant's

Constitutional right of postconviction and habeas access to the court in an ongoing and permanent manner. The Wisconsin appellate court regime demonstrated what can only be described as turning a blind eye to the serious (but irrefutable) allegations of outrageous government misconduct made consistently in Heimermann's pleadings while quick to rule against Heimermann involving procedural rules. The Wisconsin appellate court concluded:

> Heimermann alleges that Swyers violated his right to access to the courts by withholding certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the "true focus" of Fecke's investigation, the circuit court hearing the habeas petition was prevented from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by ***Heck.***

(App. 8a)

But ***Heck*** makes clear that it is not premised on an ongoing hindered access claim. Rather, the case arose after state prosecutors and police officials falsely arrested and destroyed evidence that resulted in Heck's conviction. ***Heck***, 512 U.S. at 478.

Heimermann's case, by contrast, is seen as more focused on government officials intentionally denying him, continues to deny him, meaningful access to postconviction and habeas courts for which is tethered to an already filed substantive void prosecution claim lost in the wake this government wrongdoing.

As discussed in part 5, *supra*, Piscitello originally wrote in November 1998 to Heimermann, but he was using intermediary Truth Bible Church to protect his witness protection location. (1664: App. to pet. for writ of habeas corpus 40-41.) Pursuant to the Respondents' promises to help Heimermann gain access to Piscitello's testimony, as confirmed by Respondent Swyers at the February 12, 1999 state habeas corpus hearing, Heimermann promptly passed the details of Piscitello's November 1998 correspondence on to the Respondents, in a bid to ensure Respondents can at the appointed time secure Piscitello's testimony, which was a critical clog in Heimermann's plan to prove his substantive void prosecution claim. But Respondents kept dragging their feet with anything that had a Piscitello label on it. It worked so well that every court, state and federal, has refused to endorse Heimermann's void prosecution claim since 1999.

Therefore, the conduct of the Respondents impeded Heimermann's efforts to pursue a non-frivolous habeas corpus claim because Piscitello's testimony and aforementioned as-yet-undisclosed exculpatory evidence that was blocked constituted testimony and document-based evidence required for an effective collateral attack on Heimermann's 1991 convictions. As Heimermann testified at the February 12, 1999 state habeas hearing, without this evidence, he could not effectively show that his 1991 convictions are

invalid. (Habeas Hearing Transcript, Feb. 12, 1999 at 25-26.) Accordingly, Heimermann has suffered prejudice. *See, e.g.*, ***Luecke***, 262 F. Supp. 2d at 695 (denying summary judgment, holding that Plaintiff established actual injury in denial of right of access to the courts claim where prison officials confiscated copy of his trial transcript and affidavit supporting theory on appeal). And Heimermann's state habeas petition was not frivolous because, as Heimermann has pointed out in his sworn complaint, he raised a substantive void prosecution claim in his state habeas petition, based on fraud by the state and outrageous government conduct. (Heimermann's sworn civil complaint at ¶¶ 37-38, 96-105,109.) As described more fully in part 9, *supra*, that fraud by the state and outrageous government conduct is based on the complicity on Milwaukee law enforcement's part in facilitating the circumstances that led to the murders of Binwalee and Russell, not Heimermann. *(See* pp. 18-19, *supra*.)

Therefore, as an initial matter, Heimermann is entitled to injunctive relief against the Respondents and their representatives in their official capacities to remedy the injury resulting from the violation of his right to meaningful postconviction and habeas access to the courts and to prevent future violations. 42 U.S.C. 6 1983; *see, e.g.*, ***Edwards v. Balisok***, 520 U.S. 641, 648-49 (1997). Specifically, Heimermann is entitled to a prospective injunction requiring Respondents and their representatives to replace Piscitello's testimony (to the extent it is replaceable) with the testimony of Piscitello's 1989 Milwaukee law enforcement handlers and to enjoin Respondents and their representatives from continuing to deprive Heimermann of his postconviction and habeas access

to the Courts. ***Lueck***, 262 F. Supp. 2d at 699 (in summary judgment context, declaring order to replace legal property proper).

Second, Heimermann is entitled to recover from respondents in their individual capacities, actual damages, resulting from the violation of his right to meaningful postconviction and habeas access to the courts. 42 U.S.C. 4 1983; ***Carey v. Piphus***, 435 U.S. 247 (1978). Since 1999, Heimermann has gathered many legal cases; reviewed, analyzed and researched these cases; compiled various legal materials; filed many legal documents with various courts; and repeatedly reviewed his trial, postconviction and habeas corpus cases, all in an effort to replace his wrongfully blocked state habeas corpus action. As to the circuit court calculating his actual damages, Heimermann intends to multiply the number of hours worked (at least 6 hours, nearly every day since 1999) at a reasonably hourly rate for Heimermann's work of $50.00. *See, e.g.*, ***Herdahl v. Pontotoc County School Dist.***, 964 F. Supp. 1113, 1118-19 (N.D. Miss. 1997)(calculating reasonably hourly rate of $50.00 for law clerks); ***In Re Public Service Co. of New Mexico***, 1992 U.S. Dist. LEXIS 16326, 1992 WI 278452 at *5 (S.D. Cal. 1992)(calculating reasonably hourly rate of $61.05 for non-attorney timekeeper).

Third, Heimermann is entitled to recover from respondents an award of compensatory damages, resulting from the proposition that Respondents' deprivation of Heimermann's Constitutional right of access to postconviction and habeas courts is a major contributing factor toward continuing the wrongful imprisonment of Heimermann. As to the circuit court calculating his compensatory damages, Heimermann

intends to have the circuit court calculate the damages on this front by multiplying the number of years of wrongful imprisonment since February 1999 (over 10 years, so far) at a reasonably rate per year of imprisonment of $1 million. *See. e.g.*, ***Limone v. United States***, 497 F. Supp. 2d 143, 243-245 (D. Mass. 2007)(calculating the $1 million dollar per year of imprisonment award for prolonged wrongful imprisonment that occurred because of criminal misconduct by FBI agents and other law enforcement corruption).

And fourth, Heimermann is entitled to recover punitive damages against Respondents, resulting from the proposition that Respondents exhibited reckless and callous indifference to Heimermann's Constitutional right to obtain postconviction and habeas access to the courts so that he can prove his innocence. 42 U.S.C. § 1983; ***Smith v. Wade***, 461 U.S. 30 (1983).

Under these circumstances, ***Heck*** was never intended as a mechanism to bar a prisoner's ability to bring a § 1983 action. As to Heimermann's sworn civil complaint, therefore, the Respondents were not entitled to dismissal based on ***Heck***.

II. THE QUESTION PRESENTED IS A RECURRING ISSUE OF NATIONWIDE IMPORTANCE.

This case presents an important issue of federal law: may a convicted defendant use § 1983 to restore postconviction and habeas access to the courts when he has no other forum to decide a non-frivolous claim because government officials deliberately hindered his

only remaining viable opportunity for justice. Not only has the Wisconsin appellate court regime disregarded a defendant's Constitutional right of postconviction and habeas access to the courts that links to an already filed substantive claim, it has turned a blind eye toward curing that ongoing deprivation.

In addition, there is a serious split regarding these two important aspects of the Wisconsin appellate courts. First, most federal courts have allowed use of § 1983 to overcome an ongoing and permanent hindered access to the courts in order to decide a defendant's meritorious substantive claim. Second, this Court needs to settle the question of whether ***Heck's*** "favorable termination" requirement has been supplanted by Justice Souter's principle in the 1998 case of ***Spencer v. Kemna.***

CONCLUSION

Based on all the arguments heretofore advanced, Petitioner Scott Alan Heimermann respectfully requests this Court to grant the petition for writ of certiorari. Fairness and the United States Constitution demand that this injustice be rectified at long last.

Respectfully submitted,

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Petitioner pro se

APPENDIX

APPENDIX A

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* WIS. STAT. § 808.10 and RULE 809.62.

STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

Appeal No. 2007AP2961
Cir. Ct. No. 2004CV1499

[Filed December 18, 2008]

STATE OF WISCONSIN EX REL. SCOTT A. HEIMERMANN,	)
PLAINTIFF-APPELLANT,	)
v.	)
GARY R. MCCAUGHTRY, MARK W. CLEMENTS, JOHN O'DONOVAN, JOHN DEHAAN, MICHAEL J. SULLIVAN, CINDY O'DONNELL, STEVEN B. CASPERSON, STEPHEN M. PUCKETT,	)

SAM SCHNEITER, TIMOTHY DOUMA, LYNDA J. SCHWANDT, JOHN DOE AND JOHN DOE 2,

DEFENDANTS,

JOANNE SWYERS,

DEFENDANT-RESPONDENT.

APPEAL from orders of the circuit court for Dane County: DAVID T. FLANAGAN, III, Judge. *Affirmed.*

Before Dykman, Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Scott A. Heimermann appeals from the orders that dismissed all of his claims against Joanne Swyers and denied his motion for reconsideration. Heimermann argues that the circuit court erred when it dismissed his claims, when it denied his motion for reconsideration, and when it granted costs to Swyers, and asks this court to order the circuit court to allow him to amend his complaint. Because we conclude that the circuit court did not err, we affirm.

BACKGROUND

¶2 Heimermann was convicted in 1992, after a jury trial, of two counts of first-degree intentional homicide as a party to a crime. He was charged with two other men, Edward Piscitello and Joseph Isajiw, for the execution-style killing of an apparent drug dealer and his body guard. The three men shot the victims and buried their bodies in the basement of a Milwaukee residence where Heimermann and

Piscitello lived. The victims' remains were not discovered until two years after they were killed.

¶3 We affirmed Heimermann's conviction, *see* ***State v. Heimermann***, No. 1995AP225, unpublished slip op. (Ct. App. Aug. 8, 1995), and the supreme court denied his petition for review. Since then, he has repeatedly attempted to challenge his conviction, both directly and indirectly.[1]

¶4 In the case before us now, Heimermann, who is still in prison, sued various State officials and Swyers. All of the State officials were employees of the Department of Corrections except Swyers who was an employee of the Dodge County Sheriff's office.[2] He

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[1] Heimermann has filed approximately thirty-nine appeals and writs in this court since 1991.

[2] Heimermann originally filed this case in June 2004. The defendants then had the case removed to the United States District Court for the Eastern District of Wisconsin. That court dismissed this case because an order of the United States Court of Appeals for the Seventh Circuit prohibited Heimermann from filing any action until he paid all outstanding sanctions against him. Heimermann then filed a motion for reinstatement in Dane County Circuit Court. The circuit court denied the motion. Heimermann appealed to this court. The State moved to strike the brief and dismiss the appeal until Heimermann paid the fines outstanding against him in state and federal courts. We certified the matter to the supreme court, which then decertified it and returned it here. We then denied the State's motion, and addressed the appeal on the merits. We concluded that the circuit court erred when it barred Heimermann from filing this action. We also concluded that, on the record before us, we could not resolve the question of whether the circuit court had properly dismissed Heimermann's complaint. We noted that the circuit court could take up these issues on remand, and, if appropriate,

alleges that the defendants violated his constitutional rights and committed breach of contract. His complaint states that: "This is one of those rare cases in [sic] which provides a significant, albeit isolated, example of a model inmate such as plaintiff whose protected activities account for the treatment he received in prison from malicious, sadistic and indifferent officials." Heimermann alleged that the defendants breached promises he claimed they made to him in exchange for his help in an undercover investigation. Heimermann also alleged that the actions of some of the defendants caused a circuit court judge to deny his petition for a writ of habeas corpus.

¶5 The circuit court identified five causes of action against Swyers: (1) breach of contract; (2) a claim under ***Heck v. Humphrey***, 512 U.S. 477 (1994); access to courts; (4) failure to protect; and (5) a concerted action claim. Heimermann demanded both temporary and permanent injunctions, a declaratory judgment, and more than four million dollars in compensatory damages. The court dismissed all of the claims against Swyers, for the reasons discussed later in this opinion, and also denied Heimermann's motion to reconsider.

STANDARD OF REVIEW

¶6 "Whether a complaint states a claim for relief is a question of law which this court reviews de novo." ***Meyer v. Laser Vision Inst., LLC***, 2006 WI

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impose appropriate sanctions. ***State ex rel. Heimermann v. McCaughtry***, No. 2005AP87, unpublished slip op. (Ct. App. Jan. 25, 2007).

App 70, ¶13, 290 Wis. 2d 764, 714 N.W.2d 223. "A motion to dismiss a complaint for failure to state a claim tests the legal sufficiency of the complaint." *Id.* "The reviewing court must construe the facts set forth in the complaint and all reasonable inferences that may be drawn from those facts in favor of stating a claim." *Id.* The complaint should be dismissed "only if it appears certain that no relief can be granted under any set of facts the plaintiffs might prove in support of their allegations. " *Id.*

DISCUSSION

¶7 Heimermann argues on appeal that the circuit court improperly dismissed the claims against Swyers and others.[3] Heimermann's first claim is that Swyers and other defendants breached a contract they made with him to get him to help in the investigation of a former prison guard, Robert Fecke. Specifically, Heimermann alleged that Swyers and the others induced him to help with the Fecke investigation by offering him immunity from further discipline on a conduct report; immunity from prosecution on any evidence obtained as a result of the investigation of Fecke; help with obtaining exculpatory evidence from his co-actor Piscitello; and having Heimermann transferred to a minimum security prison until he was released from prison. The circuit court dismissed Heimermann's breach of contract claims against Swyers on the ground that such a contract would violate public policy.

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[3] Because the order from which Heimermann appeals dismissed only the claims against Swyers, we address only those claims in this opinion.

¶8 Parties are free to enter into contracts, and the courts will protect that right "by ensuring that promises will be performed." ***Sonday v. Dave Kohel Agency, Inc.***, 2006 WI 92, ¶53, 293 Wis. 2d 458, 718 N.W.2d 631. Contractual rights, however, "are not absolute and a contract that is deemed contrary to public policy is void and unenforceable." ***Id.***

¶9 We agree with the circuit court that the contract as alleged by Heimermann is contrary to public policy. The terms of the alleged contract provide that Swyers would aid him in overturning his criminal conviction, have him transferred to a minimum security prison, and obtain exculpatory evidence from Piscitello. As the complaint acknowledges, Swyers is an employee of Dodge County and not of the Department of Corrections. Because Swyers is not an employee of the Department of Corrections, she had no authority to affect the terms or conditions of Heimermann's confinement.

¶10 Further, to the extent Heimermann is attempting to have himself exonerated from the underlying criminal conviction by information he claims Piscitello will provide, Swyers would not be able to obtain this result for him. As the State points out, achieving that result would require the acquiescence of the entire judicial system. We conclude that such a contract, if one existed, violates public policy, and the benefit allegedly bargained for was impossible for Swyers to obtain. We conclude that the circuit court properly dismissed Heimermann's claims for breach of contract.

¶11 The circuit court also dismissed Heimermann's claim that Swyers and the others

denied him substantive due process by denying him access to the alleged testimony of Piscitello.[4] When a plaintiff seeks to recover damages under 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment or other action that would render a conviction invalid, the "plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus." ***Heck,*** 512 U.S. at 486-87. Consequently, when a prisoner seeks damages under § 1983, the court must consider whether judgment for the plaintiff "would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." ***Id.*** at 487.

¶12 In his complaint, Heimermann refers to Piscitello's testimony as "the missing ingredient to plaintiff's release from prison recipe." The circuit court concluded that he was seeking exculpatory testimony from Piscitello that would call into question the validity of his underlying conviction. We conclude that, based on the allegations of the complaint, Heimermann is challenging his conviction and imprisonment, and consequently, his claim is barred by ***Heck.***

¶13 Heimermann also alleges that Swyers violated his right to access to the courts by withholding

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[4] Heimermann does not explain in his brief what the exculpatory testimony would be.

certain information during a 1999 habeas corpus proceeding in state court. Specifically, he alleges that Swyers testified falsely at the hearing about the investigation of Fecke, and her attempts to locate Piscitello. Heimermann states that because the circuit court did not know the "true focus" of Fecke's investigation, the circuit court hearing the habeas petition was prevented from reaching the conclusion that the criminal complaint upon which Heimermann had been convicted should be dismissed with prejudice. Again, the basics of this claim is that Heimermann's criminal conviction was invalid. Consequently, this claim is also barred by ***Heck.***

¶14 Heimermann's next claim is that, because of his undercover work in the investigation of former prison guard Fecke, he is now known as a "snitch" in prison, and his "vulnerability to violence" in prison has increased. "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate" violates the Eighth Amendment's prohibition against cruel and unusual punishment. ***Farmer v. Brennan***, 511 U.S. 825, 828 (1994) (citation omitted). Not every injury suffered by an inmate constitutes an Eighth Amendment violation. ***Id.*** at 833. A prison official violates the Eighth Amendment when two conditions are met: (1) the deprivation must be "sufficiently serious," in other words "the inmate must show that he is incarcerated under conditions posing a substantial risk of serious harm"; and (2) the prison official must demonstrate "deliberate indifference" to the inmate's health or safety. ***Id.*** at 834 (citation omitted).

¶15 The circuit court dismissed this claim, finding that Swyers was not a prison official. The court further rejected Heimermann's argument that Swyers

conspired with the State defendants to deprive him of a safe environment.

¶16 In his brief to this court, Heimermann argues that the allegations of the complaint are sufficient to establish that Swyers conspired with the State officials to deprive him of his Eighth Amendment rights. Heimermann argues that the complaint alleges that Swyers and the other defendants threatened him to get him to be part of the Fecke investigation, and then the defendants "expos[ed] Heimermann to live in [a] maximum security prison environment that is prevalent with violence." He further argues that the complaint alleges that he is a "model prisoner," yet he was still transferred to a maximum security prison, and that he is "actually innocent and wrongfully incarcerated."

¶17 There are several problems with this argument. First, Heimermann's complaint does not contain any allegations that Swyers in any way was a part of the decisions that led to the deprivation of his Eighth Amendment rights. Specifically, Heimermann does not allege that Swyers participated in the decisions about where he would be confined. And, second, as the State points out, Heimermann has not alleged that he has suffered any harm. Further, we note that at least a part of this claim is based on Heimermann's allegation that he was wrongfully convicted and confined. Consequently, the claim is also barred by ***Heck***. We again conclude that the circuit court properly dismissed Heimermann's claim for failure to protect.

¶18 Heimermann's last claim against Swyers is a claim for common-law conspiracy. The circuit court

dismissed this claim, finding that Heimermann had not alleged liability under WIS. STAT. § 895.045(2) (2005-06).[5] In his brief to this court, Heimermann argues that Swyers and the other defendants engaged in a common-law conspiracy to deprive him of his constitutional right to adequate access to postconviction remedies and safe environment.

¶19 In Wisconsin, "there is no such thing as a civil action for conspiracy. There is an action for damages caused by acts pursuant to a conspiracy but none for the conspiracy alone." ***Onderdonk v. Lamb***, 79 Wis. 2d 241, 246, 255 N.W.2d 507 (1977) (citations omitted).

> The gravamen of a civil action for damages resulting from an alleged conspiracy is thus not the conspiracy itself but rather the civil wrong which has been committed pursuant to the conspiracy and which results in damage to the plaintiff. The resultant damages in a civil conspiracy action must necessarily result from overt acts, whether or not those overt acts in themselves are unlawful.

Id. at 246-47. The wrongful acts "must be set out with the same certainty and particularity as in an ordinary civil action . . . so that the opposite party or parties will be apprised of what they will be called on to answer" ***Id.*** at 247(citation omitted).

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[5] All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

> Facts should also be alleged which show that the acts done in pursuance of the conspiracy were illegal or wrongful, or that they were done for an unlawful purpose or by an unlawful means, unless the alleged conspiracy itself has for its purpose the doing of an unlawful act. An averment that a party has acted unlawfully without showing what he did is not sufficient as an averment of issuable facts, and, on the other hand, an allegation of a lawful act is not sufficient to support a charge of conspiracy.

Id. at 248 (citation omitted).

¶20 Heimermann does not specifically allege in the complaint a cause of action for civil conspiracy. In his brief to this court, Heimermann argues that his claim consists of "various combined paragraphs in the complaint. " Heimermann argues that Swyers acted with the other defendants to breach a contract and to keep him wrongfully imprisoned. We have concluded, however, that the alleged acts were not "wrongful acts." Further, we have already decided that Heimermann is not wrongfully imprisoned. Since neither the acts nor the purpose of the alleged conspiracy were wrongful, the claim must be dismissed. Because we have concluded that the circuit properly dismissed the claims against Swyers, we also conclude that the circuit court properly denied Heimermann's motion for reconsideration.

¶21 Heimermann also argues that the circuit court erred when it granted costs to the defendants. Heimermann bases his objections on the substantive

grounds argued in his brief. Because we have rejected those arguments, we also reject his challenge to the award of costs.

¶22 Heimermann's final argument is that we should remand the matter with directions to the circuit court to allow him to amend his complaint. Heimermann asserts that he filed a motion in the circuit court asking to be allowed to amend the complaint. Heimermann filed the motion to amend, however, after the court entered the order from which he appeals. The motion to amend is part of the on-going proceedings before the circuit court and is not before us in this appeal. For the reasons stated, we affirm the orders of the circuit court.

By the Court.—Orders affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

APPENDIX B

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 12
DANE COUNTY

Case No. 04 CV 1499

[Filed November 21, 2007]

State ex rel. Scott A. Heimermann	)
	)
Plaintiff,	)
	)
vs.	)
	)
Gary R. McCaughtry, et al.,	)
	)
Defendants.	)
	)

ORDER APPROVING BILL OF COSTS OF DEFENDANT JOANNE SWYERS

Defendant Joanne Swyers has submitted a bill of costs ion the total amount of $737.52 and the plaintiff has obgj3ected to that bill of costs. The court has reviewed the objections of the plaintiff and hereby approves defendant Swyers bill of costs as submitted.

By the court this 21st day of November, 2007.

/s/
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

G:04CV1499.OR10

APPENDIX C

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 12
DANE COUNTY

Case No. 04 CV 1499

[Filed October 16, 2007]

State ex rel. Scott A. Heimermann	)
	)
Plaintiff,	)
	)
vs.	)
	)
Gary R. McCaughtry, et al.,	)
	)
Defendants.	)
	)

ORDER DENYING PLAINTIFF'S MOTION FOR RECONSIDERATION

In a decision and order rendered September 28, 2007 the court dismissed all claims of the plaintiff as to defendant Joanne Swyers. In a decision and order rendered September 27, 2007, the court dismissed all claims other than those founded upon failure-to-protect and First Amendment theories, as to defendants Gary R. McCaughtry, Mark. W. Clements, John O'Donovan, John Dehaan, Michael J. Sullivan,

Cindy O'Donnell, Steven B. Casperson, Stephen M. Puckett, Sam Schneiter, Timothy Douma and Lynda J. Schwandt. The plaintiff has filed a motion to reconsider these decisions, denominated "motion for reconsideration of judgment. Upon consideration of the plaintiff's motion the court concludes that it is in essence no more than a restatement of legal argument and factual assertions already found by the court to be both unpersuasive and unfounded. The plaintiff's motion for reconsideration offers no adequate basis for the relief sought and is hereby denied. Stats.

By the court this 16th day of October, 2007,

/s/
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

G:04CV1499.OR9

APPENDIX D

STATE OF WISCONSIN
CIRCUIT COURT
BRANCH 12
DANE COUNTY

Case No. 04 CV 1499

[Filed September 28, 2007]

State ex rel. Scott A. Heimermann	)
	)
Plaintiff,	)
	)
vs.	)
	)
Gary R. McCaughtry, et al.,	)
	)
Defendants.	)
	)

DECISION AND ORDER

The instant action began with a lawsuit filed by Plaintiff Scott A. Heimermann (Heimermann) in 2004. Heimermann, a prisoner, seeks several forms of relief, including over four million dollars in compensatory damages from Defendants Gary R. McCaughtry (McCaughtry), Mark. W. Clements (Clements), John O'Donovan (O'Donovan), John Dehaan (Dehaan), Michael J. Sullivan (Sullivan), Cindy O'Donnell (O'Donnell), Steven B. Casperson (Casperson),

Stephen M. Puckett (Puckett), Sam Schneiter (Schneiter), Timothy Douma (Douma), Lynda J. Schwandt (Schwandt) and Joanne Swyers (Swyers).[1] Swyers, as the only non-state defendant in this action, filed a Motion to Dismiss on April 30, 2007. Shortly thereafter, the remaining, state-employed defendants filed a Motion to Dismiss in Part.

On September 27, 2007, this court issued a Decision and Order in which it dismissed all but two of Heimermann's claims against the State Defendants. The court has now reviewed the parties' arguments on Swyers' motion and finds that Heimermann's contract claim must be dismissed because the alleged contract would violate public policy. Because his "Heck" and access to courts claims are not cognizable under § 1983, they must also be dismissed. Further, Heimermann's failure to protect claim must be dismissed because the complaint contains no facts from which this court may infer that Swyers willfully collaborated with the State Defendants to deprive Heimermann of his rights under the Eighth Amendment. Finally, because Heimermann's complaint fails to allege any liability under §895.045(2) Wis. Stats., he may not proceed with that claim at this time.

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[1] The court will refer to McCaughtry, Clements, O'Donovan, Dehaan, Sullivan, O'Donnell, Casperson, Puckett, Schneiter, Douma and Schwandt collectively as "State Defendants." As Swyers is not employed by the State and has filed a separate motion, the court will refer to her only as "Swyers."

BACKGROUND

The procedural background leading to the pending motion to dismiss is discussed at length in this court's September ___, 2007 Decision and Order. As noted above, Swyers filed the pending Motion to Dismiss on April 30, 2007. Swyers argues that "the sole impetus for this action is plaintiff's attempt to invalidate his previously adjudicated criminal conviction"; therefore, this action is barred by Heck v. Humphrey, 512 U.S. 477 (1994). (Swyers Br. p. 4.)[2] Essentially, Swyers argues that, because the *entire* complaint is really an attempt to obtain release from prison, it should be dismissed under Heck. This court, however, agrees with the court of appeals' characterization of Heimermann's complaint.[3] Specifically that the

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[2] On April 30, 2007, Swyers filed an affidavit containing certain facts and beliefs not clearly stated upon personal knowledge. In a May 1, 2007 Order, this court noted that it would not consider such information in the context of a motion to dismiss and indicated to Heimermann that he need not respond to the issues raised by Swyers' affidavit.

[3] In its decision remanding the case to this court, the court of appeals stated:

> [w]e next address whether the circuit court's decision should be affirmed because Heimermann has failed to state a claim or because he is improperly attempting to relitigate a conviction that he has already challenged in several prior actions. We cannot resolve these questions based on the briefing before us. However, we note that Heimermann's complaint alleges conduct that relates to incidents that have occurred since he has been imprisoned and thus does not relate to his conviction. We also note that he has presented an argument in his briefs on appeal that his claim is cognizable under Heck v. Humphrey, 512

complaint discusses and seeks remedies for *some* conduct that occurred *after* Heimermann's conviction, and which does not appear related to that conviction. Thus, the court declines to hold that Heimermann's *entire* complaint is barred by Heck and will instead individually address each of Heimermann's claims.

HEIMERMANN'S COMPLAINT

Per Heimermann, his complaint contains eight causes of action: (1) a contract based claim; (2) a "Heck" claim; (3) an access to courts claim; (4) a failure to protect claim; (5) a retaliation claim based on allegedly unjust discipline; (6) a retaliation claim based on alleged sanctioning of unjust discipline; (7) an interference with business relations claim; and, (8) a concerted action claim. (Heimermann Br., p. 5.) Briefly, Heimermann's claims against Swyers can be summarized as follows:

- *First Cause* of *Action*[4]: Breach of contract claim against Swyers and various State Defendants based on Heimermann's alleged assistance in the prosecution of Robert Fecke (Fecke). Heimermann claims that Swyers, and other State Defendants, made various promises to him in exchange for his assistance. (Compl. ¶52.) Heimermann alleges that was offered immunity from further discipline on

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U.S. 477, 489, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).

State ex rel. Heimermann v. McCaughtry, 2007 WI App. 34, ¶7, 728 N.W.2d 373 (Table), 2007 WL 188898.

[4] Heimermann cites paragraphs 52-57 and 107-08 when describing these claims. (Heimermann Br., p. 5.)

conduct report 912772 and that said conduct report was to be expunged from his prison record; that he was granted immunity from prosecution based on any evidence that might come to light during the investigation; that he was promised certain exculpatory information from a witness protection inmate, Edward J. Piscitello (Piscitello); and, that he would be transferred to a minimum security facility until he was released from prison. (Id.) Based on these promises, Heimermann allegedly worked undercover on the Fecke investigation for nearly two months. (Compl. ¶53.) Heimermann claims that these promises, and his performance, led to an implied-in-law agreement that Swyers breached. (Compl. ¶108.) On a theory of quantum meruit, Heimermann argues that he should be compensated for the services he provided. (Compl. ¶107.)[5]

- *Second Cause of Action*[6]: A "Heck" claim under which Heimermann asserts that he has been denied substantive due process. (Compl. ¶109.) Relying on the same facts alleged in support of his breach of contract claim, Heimermann claims that Swyers and certain State Defendants have denied him substantive due process by denying him access to Piscitello. (Id.) Per Heimermann, "the missing

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[5] Note, Heimermann also alleges that Swyers threatened his mother in an effort to enlist his assistance. (Compl. ¶¶50-51.) It is not clear to this court exactly which claim this factual information is relevant to; however, the event purportedly occurred around the same time the alleged "promises" were made.

[6] Heimermann cites paragraphs 52-57 and 109 when describing this claim. (Heimermann Br., p. 5.)

ingredient" in his "release from prison recipe" is Piscitello's "exculpatory" testimony. (Id.)

- *Third Cause of Action*[7]*:* An access to courts claim under which Heimermann contends that Swyers and certain State Defendants perpetrated fraud upon the Outagamie County Circuit in 1999. (Compl. ¶¶96, 110.) Heimermann claims that Swyers' testimony during a 1999 habeas petition hearing led to the dismissal of that petition. (Compl. ¶98.) Heimermann alleges that Swyers lied about the nature of the investigation into Fecke and Heimermann's involvement in any illegal activity. (Compl. ¶¶98-99.) In addition, Heimermann claims that Swyers violated his rights by allowing him to remain in jail even though she knew, through the Fecke investigation, that "there is no valid legal basis or judicial order to keep plaintiff in prison." (Compl. ¶104.) Heimermann contends that Swyers knew about Piscitello's exculpatory testimony and that Fecke was helping him obtain it, but withheld that information from the judge in his habeas proceeding. (Compl. ¶103.)

- *Fourth Cause of Action*[8]*:* A failure to protect claim under §1983 against Swyers and certain State Defendants based on their failure to keep Heimermann out of general population status. (Compl. ¶112.) Heimermann claims that, as a result of his assistance in the Fecke investigation,

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[7] Heimermann cites paragraphs 96-106 and 110-111 when describing this claim. (Heimermann Br., p. 5.)

[8] Heimermann cites paragraphs 67, 69-70, 72-78, 84 and 112-13 when describing these claims. (Heimermann Br., p. 5.)

he is labeled a "snitch". (Compl. ¶112.) He argues that Swyers' deliberate indifference to his safety is a violation of his Eighth and Fourteenth Amendment rights.

- *Fifth Cause of Action*[9]: A §895.045(2) claim against Swyers in which Heimermann alleges that she "concerted" with the State Defendants against him.

DISCUSSION

"The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." Weber v. City of Cedarburg, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). Only those allegations made within the complaint are relevant to the court's decision. Id. The court must accept the facts stated in the complaint, and the reasonable inferences that may be drawn from them, as true. Friends of Kenwood v. Green, 2000 WI App 217, ¶ 11, 239 Wis. 2d 78, 619 N.W.2d 271. In addition, the court may look to any document attached to the complaint and made part thereof. Id.

"A complaint should not be dismissed for failure to state a claim unless it appears certain that no relief can be granted under any set of facts that a plaintiff can prove in support of his or her allegations." Watts v. Watts, 137 Wis. 2d 506, 512, 405 N.W.2d 303 (1987).

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[9] Unlike his other claims, Heimermann does not cite his complaint in describing this claim. (Heimermann Br., p. 5.)

I. CONTRACT CLAIM

Under a unilateral contract "one party has made a promise and only that party is subject to a legal obligation." Paulson v. Olson Implement Co., 107 Wis. 2d 510, 517, fn 6, 319 N.W.2d 855 (1982). "This is typified by the law school hypothetical situation where A says to B, '[i]f you walk across Brooklyn Bridge, I promise to pay you ten dollars.'" Id. (internal quotation omitted). "A has made a unilateral contract which arises when-and if-B performs the act." Id. "A unilateral contract will be legally enforceable when it has induced substantial performance or when it has brought about a change of position on the part of the offeree." Lazarus v. American Motors, 21 Wis. 2d 76, 83, 123 N.W.2d 548 (1963).

In the instant action, Heimermann argues that his assistance in the Fecke investigation resulted in a legally binding unilateral contract between himself and Swyers. Based on the existence of this alleged contract, Heimermann contends that he is entitled to compensation; i.e. "transfer to a minimum security facility and the information supporting his factual innocence that he bargained for, earned and did not receive." (6/12/07 Heimermann Br., p. 6.)

While the Wisconsin Supreme Court has "consistently recognized that parties are free to contract and has endeavored to protect the right to contract by ensuring that promises will be performed[,] . . . . contractual rights are not absolute and a contract that is deemed contrary to public policy is void and unenforceable." Sonday v. Dave Koehl Agency, Inc., 2006 WI 92, ¶53, 293 Wis. 2d 458, 718 N.W.2d 631 (internal citation omitted). Assuming that the

allegations contained in Heimermann's complaint are true and that a unilateral contract was formed between himself and Swyers, that contract would be contrary to clear public policy and thus unenforceable.

Public policy may be expressed by statute or administrative regulation. Id. fn. 17. Under Wisconsin Statutes, the DOC shall "[s]upervise the custody and discipline of all prisoners. . . ." §301.03(2) Wis. Stats. This statute reflects a clear policy decision by the legislature concerning the authority of the DOC. In the instant action, Heimermann would have this court usurp that authority by holding that a contract in which a non-DOC employee makes certain promises with respect to an inmate's conditions of confinement is enforceable. The public's interest in the ordered administration of its prison system simply cannot be ignored because one inmate's unreasonable expectations.

Swyers is not now, nor was she at the time the contract was allegedly formed, a DOC employee. As such, she had no authority to offer immunity in prison disciplinary proceedings, expunge conduct reports or ensure Heimermann's transfer to a minimum security facility. The authority to perform each of these promises rests solely with the DOC, whose policies and procedures on each are codified in Wisconsin Administrative Code. To hold that a contract deaf to these clear statements is enforceable, would be to ignore sound public policy on the administration of Wisconsin's prison system, this the court cannot do. Therefore, this court holds that Heimermann's contract claims against Swyers must be dismissed.

II. "HECK" CLAIM

In Heck v. Humphrey, 512 U.S. 477, 486-87 (1994), the United States Supreme Court stated:

> in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated. But if the district court determines that the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed, in the absence of some other bar to the suit.

In its September ___, 2007 Decision and Order, this court found that Heimermann's "Heck" claim was barred by Heck v. Humphrey, 512 U.S. 477 (1994). Because Heimermann's "Heck" claim against Swyers is based on the same allegations and seeks the same relief, it must also be dismissed.

III. ACCESS TO COURTS CLAIM

As with the 'Heck" claim, in its September ___, 2007 Decision and Order, this court found that Heimermann's access to court claim was barred by Heck. The court found that Heimermann's access to courts claim sought exculpatory testimony, which would necessarily call into question the validity of his underlying conviction and required dismissal of the claim. Because Heimermann's access to courts claim against Swyers is based on the same allegations and seeks the same relief, it must also be dismissed.[10]

IV. FAILURE TO PROTECT CLAIM

"[T]he Eighth Amendment's prohibition against cruel and unusual punishment [is] made applicable to the States through the Fourteenth Amendment's Due Process Clause." DeShaney v. Winnebago Co. Dept. of Soc. Serv., 489 U.S. 189, 198 (1989). "A prison official's 'deliberate indifference' to a substantial risk of serious harm to an inmate violates the Eighth Amendment." Farmer v. Brennan, 511 U.S. 825, 828 (1994). "[P]rison

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[10] Further, while prisoners have a constitutional right of meaningful access to the courts, Bounds v. Smith, 430 U.S. 817, 822 (1977); § 1983 does not provide a cause of action against police officers for giving false testimony. Briscoe v. LaHue, 460 U.S. 325, 329-345 (1983).

officials have a duty . . . to protect prisoners from violence at the hands of other prisoners." Id. at 833 (internal citation omitted). "It is not, however, every injury suffered by one prisoner at the hands of another that translates into constitutional liability for prison officials responsible for the victim's safety."Id. at 834. Rather, the Eighth Amendment is violated only when: (1) the deprivation alleged is, objectively, sufficiently serious; and, (2) the prison official demonstrates deliberate indifference to the inmate's health or safety. Id. at 835.

In the instant action, Heimermann claims that "the defendants' affirmative actions have actually increased the vulnerability of Scott to violence within the prison because of his undercover role in the Fecke et al. investigations where he is now known as a 'snitch' in prison." (Heimermann Br., p. 10, emphasis in original.) While Swyers clearly is not employed by the DOC, Heimermann, citing Dwares v. City of New York, 985 F.2d 94 (2nd Cir. 1993); claims that Swyers is liable because she assisted in creating the danger.

Heimermann's reliance on Dwares is misplaced. In Dwares, the Second Circuit noted that "[a] private individual may be subject to liability under [§1983] if he or she *willfully collaborated* with an official state actor in the deprivation of a federal right." 985 F.2d at 98 (emphasis added). Heimermann's *complaint* does not, however, allege that Swyers conspired with the State Defendants to deprive him of a safe prison environment.[11]

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[11] Heimermann does appear to allege such a conspiracy in his brief. (Heimermann Br., p. 23.) However, only those allegations

Accepting the facts stated in the complaint and the reasonable inferences that may be drawn therefrom as true, the most this court can conclude is that Swyers' actions *resulted* in an unsafe environment for Heimermann. However, the complaint contains no allegations from which this court may infer that she *planned* to do so, or that she willfully collaborated with the State Defendants for such a purpose. As such, Heimermann's failure to protect claim against Swyers must be dismissed.

V. "CONCERTED ACTION" CLAIM

Wisconsin Statutes provide:

> . . . if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.043(5).

§895.045(2) Wis. Stats. "[T]o be liable for a concerted action under Wis. Stat. §895.045(2) the persons must have acted in accordance with a common scheme or plan to accomplish the result that caused the injury." Richards v. Badger Mut. Ins. Co., 2006 WI App. 255, ¶2, 297 Wis. 2d 699, 727 N.W.2d 69. In his brief, Heimermann argues that

> this Court should conclude on the basis of Swyers procuring [his] services in the investigation of Fecke et al. through false promises to [him], where later state defendants

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made within the complaint are relevant to this court's decision.

> caused further injury when increasing Scott's vulnerability in maximum security prisons and repeatedly issuing fabricated disciplinary tickets while [he] is illegally imprisoned, properly can be considered a cause of action within the meaning of Wis. Stat. §895.045(2).

(Heimermann Br., p. 13.)

However, this court need not reach the question of whether Swyers and the State Defendants acted in accordance with a common scheme or plan to accomplish Heimermann's alleged injuries because his complaint fails to allege any liability under §895.045(2). Heimermann thus failed to provide Swyers with sufficient notice of any such claim. As such, the court holds that Heimermann may not proceed with his concerted action claim at this time.

CONCLUSION

Because the alleged contract would violate public policy, Heimermann's contract claim against Swyers' must be DISMISSED.

Heimermann's "Heck" and access to courts claims both challenge the very fact of his imprisonment, they are not cognizable under §1983. Heimermann's "Heck" and access to courts claims against Swyers are therefore DISMISSED.

As the complaint contains no allegations from which this court may infer that Swyers willfully collaborated with the State Defendants to deprive him of his rights under the Eighth Amendment,

Heimermann's failure to protect claim against Swyers must also be DISMISSED.

Finally, because Heimermann's complaint fails to allege any liability under §895.045(2), he may not proceed with that claim at this time.

In short, the court orders that Heimermann's complaint against Swyers is DISMISSED WITH PREJUDICE. This Decision and Order is a final order that disposes of the entire matter in litigation as to defendant Swyers and, as to defendant Swyers, it is intended by the court to be an appealable order within the meaning of sec. 808.03(1), Wis. Stats.

By the court this 28th day of September, 2007.

/s/
Judge David Flanagan

cc: AAG Mary Elizabeth Sheehan
Attorney Raymond J. Pollen
Scott A. Heimermann

G:04CV1499.OR7

APPENDIX E

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April 14, 2009

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You are hereby notified that the Court has entered the following order:

No. 2007AP2961
Heimermann v. McCaughtry L.C.#2004CV1499

A petition for review pursuant to Wis. Stat. § 808.10 having been filed on behalf of plaintiff-appellant-petitioner, Scott A. Heimermann, and considered by this court;

IT IS ORDERED that the petition for review is denied, without costs.

David R. Schanker
Clerk of Supreme Court